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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/567,611

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Hans-Gunter Benner

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COHEN, PONTANI, LIEBERMAN & PAVANE LLP

551 FIFTH AVENUE

SUITE 1210

NEW YORK, NY 10176

EXAMINER

SHABMAN, MARK A

ART UNIT

PAPER NUMBER

2856

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/567,611	<b>Applicant(s)</b> BENNER ET AL.	
	<b>Examiner</b> MARK SHABMAN	<b>Art Unit</b> 2856	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 July 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Notice of Change of Examiner***

The Examination of this case from this point forward will be conducted by Examiner Mark A Shabman, also of Group Art Unit 2856.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-8 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

**Claim 1** is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding **claim 1**, the claim recites the limitation "wherein the lever arm is configured to pivot with the plastic clip in response to the fuel filling level when the guide curve contacts a boundary of the installation opening." This limitation is unclear as it depends on the condition of the tank and its contents. For example, if the tank installation opening 3 is larger than the support 5, the guide part 14 may not contact the

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boundary as claimed. Also, if the unit is to be installed while the tank is full, or close to full, the lever arm will pivot in response to the float contacting the fluid surface and stay pivoted such that the guide curve will not contact the boundary as claimed. There further is no indication in the detailed description as to how the arm "pivots in response to the fuel level *when* the guide curve contacts a boundary" as is claimed. This is taken to mean that the pivoting only occurs when the float is in contact with the fluid surface *and* level guide is contacting the boundary of the installation. Paragraph 0019 of the specification discloses only how the guide curve causes the arm to pivot and makes no reference to it being in response to the fuel filling level. It is possible for the lever arm to pivot in response to the fuel filling level *or* when the guide curve contacts a boundary.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**Claims 1-8** are rejected under 35 U.S.C. 103(a) as being unpatentable over Kato JP 11-237274 (English machine translation provided) hereinafter referred to as Kato in view of Totten US Patent 6,599,096 B1 hereinafter referred to as Totten.

Regarding **claim 1**, the apparatus of Kato as seen in figures 1 and 2 of the drawings discloses a filling level sensor for detecting a level of fuel in a tank. Kato does not explicitly disclose a tank with an installation opening through which the level sensor

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is inserted, however it is understood that the level sensor is for use in a tank such as that seen in Totten. Totten discloses the tank having an installation opening 16 allowing for installation of a sensor. It would have been obvious to one of ordinary skill in the art at the time of invention to have used such a tank with such an opening in conjunction with the apparatus of Kato to allow for easier installation and removal of the sensor if it was to fail or require maintenance. Kato further comprises a float 11 and a lever arm 10 which is coupled to the float and follows a fuel filling level. A "clip" 12 is present which is attached to the level arm 10. A support 1 can be seen to which the clip 12 is coupled, providing installation in the tank. The clip comprises a guide part 13 which protrudes laterally over the support as can be seen in figure 1, and includes a contour 13b having a guide curve on a side facing away from the support (also seen in figure 1). The lever arm in the apparatus of Kato pivots in response to the filling level of the tank to determine the fuel level within and would be capable of pivoting if the guide curve were to come in contact with the boundary of the installation opening during installation in the tank of Totten. Further, the courts have held that apparatus claims must be structurally distinguishable from the prior art in terms of structure, not function. See *In re Danley*, 120 USPQ 528, 531 (CCPA 1959); and *Hewlett-Packard Co. v. Bausch and Lomb, Inc.*, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990). The Courts have held that the manner of operating an apparatus does not differentiate an apparatus claim from the prior art, if the prior art apparatus teaches all of the structural limitations of the claim. See *Ex Parte Masham*, 2 USPQ2d 1647 (BPAI 1987). In the present case the installation step of the level sensor would dictate whether the lever arm would pivot when the guide curve

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contacts a boundary of the installation opening as claimed, and therefore as the structural limitations of Kato would allow for such an occurrence, it is capable of satisfying the limitation. The clip 12 of Kato is not explicitly disclosed as being constructed from plastic, however, it would have been obvious to one of ordinary skill in the art at the time of invention to have used plastic to construct the clip as plastic is non-corrosive and inexpensive and would help prevent any unwanted interaction between the detection objects nearby.

Regarding **claim 2**, the "guide curve" of Kato has a curved edge pointing away from the support as claimed.

Regarding **claim 3**, as seen in figure 1 of Kato, the "support" 1 has an edge with a smooth contour on a side facing away from the guide part of the lever arm.

Regarding **claim 4**, the guide part of Kato is attached to the lever arm as seen in figures 1 and 2. It would have been obvious to one of ordinary skill in the art at the time of invention to have attached the two pieces in any form possible, such as by a latching connection to ensure that they move together with respect to the fluid level.

Regarding **claim 5**, the guide part and lever arm of Kato are seen as integral parts within the apparatus which are not capable of functioning alone.

Regarding **claim 6**, Kato discloses a lever wire 10 which is coupled to the clip and secures the float in place as claimed.

Regarding **claim 7**, it would have been obvious to one of ordinary skill in the art at the time of invention to have manufactured the fuel tank to comprise an installation opening which is no larger than necessary for insertion of the level sensor or to have

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manufactured a level sensor based on the size of the installation opening in which it is to be inserted, to allow for the smallest possible sensor to be used, thereby maximizing the capacity of the tank itself.

Regarding **claim 8**, as can be seen in figure 2 of Totten, an installation flange 20 can be used to keep the level sensor from falling into the tank where it would be irretrievable. It would have been obvious to one of ordinary skill in the art at the time of invention to have used such a flange in the apparatus of Kato to prevent the same from happening.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MARK SHABMAN whose telephone number is (571)270-3263. The examiner can normally be reached on M-F 8:00am - 4:30pm, EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Hezron Williams can be reached on (571) 272-2208. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/M. S./

Examiner, Art Unit 2856

/Hezron Williams/

Supervisory Patent Examiner, Art Unit 2856